

**SIERRA CLUB AIR TOXICS CAMPAIGN**

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**DELIVERED BY MESSENGER**

Honorable Kathleen A. Sheehy  
Office of Administrative Hearings  
100 Washington Square Suite 1700  
100 Washington Avenue South  
Minneapolis, Minnesota 55401-2138

RE: In the Matter of the Proposed Adoption of Amendments to the EQB Power Plant  
Siting Rules, Minnesota Rules Chapter 4400.

Dear Judge Sheehy:

The Sierra Club is a national environmental organization with over 700,000 members and approximately 19,000 members who reside in Minnesota. Since June 2000, the Sierra Club has coordinated an Air Toxics Campaign in Minnesota to reduce air pollutants, including emissions from fossil fuel power plants that affect human health and the natural environment. The Sierra Club participated in the process that led to adoption of Energy Security Reliability Act of 2001 upon which sections of the proposed Amendments are based and has participated in the administrative consideration of the proposed Rules.

The Sierra Club appreciates all of the work that has been done by the Environmental Quality Board staff to develop new Rules pertaining to power plant siting and power line routing and recognizes their efforts to be fair to all stakeholders.

The Sierra Club's comments on the proposed Amendments to the EQB Power Plant Siting Rules, Minn. Rules 4400.0200 through 4400.5000 focus on four fundamental issues.

The standards and criteria for issuance or denial of permits under the Rules fail to incorporate pertinent Minnesota environmental laws and, thus, preserve the balance of power plant siting and environmental concerns required under Minnesota case law.

The proposed Rules fail to assure that environmental review of the size, type, timing, configuration and voltage of power plants and power lines occurs before such facilities are approved. The Rules must comply with the legislative intent of avoiding duplication,

without permitting a situation where no environmental review of these critical issues takes place.

The proposed Rules contain exemptions to the Minnesota Environmental Quality Board permitting requirement that are inconsistent with underlying laws and would permit applicants to avoid consideration of local impacts and mitigation for facilities with the potential for significant environmental impacts.

The proposed Rules provide inadequate opportunity for public participation in the process due to incomplete notice and constraints on timing. The proposed Rules also fail to place the burden of proof on the applicant requesting special procedural consideration.

The Sierra Club suggests that amendments are needed to address these key issues and to ensure that the proposed Rules are reasonable and consistent with the underlying scheme of environmental protection in Minnesota's Environmental Policy Act and Minnesota's Environmental Rights Act.

Minnesota courts have consistently construed legislation pertaining to power plant and power line siting and routing to harmonize with, rather than supersede the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act.

As the Minnesota Supreme Court stated in People for Environmental Enlightenment and Responsibility v. Minnesota Environmental Quality Council, 266 N.W. 2d 858, 865 (Minn. 1978):

Although the focus of each of these statutes is slightly different, together they are part of a coherent legislative policy, one whose aims are to harmonize the need for electric power with the equally important goal of environmental protection. Recognizing that the MEQC [Minnesota Environmental Quality Council, now MEQB] constituted the best pool of environmentally skilled personnel, the legislature chose it to administer the PPSA [Power Plant Siting Act]. To ensure that the MEQC would not sacrifice environmental protection in its attempt to site power plants and HVTLs [High Voltage Transmission Lines] as efficiently as possible, it required that "to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in [MEPA]." Section 116D.03. .

*Recently, in No Power Line, Inc. v. Minnesota EQC, Minn. 262, N.W. 2d 312, 323 (1977), we decided that the legislature did not intend the PPSA to preempt MEPA [Minnesota Environmental Policy Act] and make it superfluous. Today we reach a similar conclusion regarding MERA [Minnesota Environmental Rights Act]. Rather than intending the PPSA to supersede MERA, the legislature passed all these statutes to ensure that administrative agencies would discharge fully their environmental responsibilities.*

Avoiding duplication and procedural inefficiency in Minnesota Rules 4400 is a laudable goal, but to the extent that the proposed Rules conflict with the equally important goal of environmental protection, they are unreasonable and require amendment prior to their adoption.

**Clarify that siting and routing permits may only be issued consistent with Minnesota environmental laws. [Proposed Rule 4400.3050]**

Although case law states that the siting and routing of power plants and power lines must be harmonized with the Minnesota Environmental Policy Act and the Minnesota Environmental Rights Acts, the proposed Rules fail to provide the needed reference to this substantive standard in defining criteria for issuing permits. The Sierra Club believes that an explicit statement that routing and siting permits may only be issued consistent with the Minnesota Environmental Policy Act is needed to restore balance to the Rules and ensure that they are reasonable.

The EQB Staff Suggested Changes on October 11, 2002 acknowledge that both the Minnesota Environmental Rights Act and the Minnesota Environmental Policy Act must apply to EQB decisionmaking. The Sierra Club concurs with the EQB's analysis, but suggests that the specific requirements of Minnesota Statutes 116D.04 should be cited in the first sentence of the standards as well.

The Sierra Club recommends that the Proposed Rules clarify the standard for determination as follows:

**4400.3050 STANDARDS AND CRITERIA.**

No site permit or route permit shall be issued in violation of the site selection standards and criteria established in Minnesota Statutes, sections 116C.57 ~~and~~ 116C.575, and 116D.04 and in rules adopted by the board. The board shall issue a permit for a proposed facility when the board finds, in keeping with the requirements of Minnesota Statutes chapter 116D and Minnesota Statutes chapter 116B, that the facility is consistent with state goals to conserve resources, minimize environmental impacts, and minimize human settlement and other land use conflicts and ensures the state's electric energy security through efficient, cost-effective power supply and electric transmission infrastructure

**Ensure that Environmental Review of Issues of Size, Type, Timing, Configuration, and Voltage Takes Place. [ Proposed Rules 4400.1700, subpart 5; 4400.1700, subpart 12; 4400.2750, subp. 7, 4400.3250]**

Consistent with thirty years of statutory authority and case law, in adopting Minn. Stat. 116C.53, subdivision 2, the Legislature did not intend to eliminate or supersede environmental review, but to create a rational and sequential process. Minn. Stat. 116C.53 states that when the Public Utilities Commission has determined the need for a

project, certain questions should not be included in the subsequent siting or routing procedure.

This statute was intended to avoid duplication in the consideration of power plants and power lines, not to avoid environmental review of alternatives. If questions such as size, type, timing, configuration and voltage of power plants and power lines have already been considered by State regulatory authorities in the certificate of need process, it is inefficient to have these issues reconsidered by the Environmental Quality Board (EQB) in siting or routing proceedings for the same facility.

However, for this sequential and orderly process to work without denying an opportunity for environmental review of alternatives to a high voltage transmission line or a large new coal plant, key issues about the size, type, timing of the facility must have been considered by regulatory authorities before a certificate of need is granted.

The Administrative Law Judge is somewhat hampered in this case by the piecemeal consideration of applicable Rules. But, even without seeing a draft of the proposed new Rules for environmental review in the certificate of need process, Minnesota Rules, Chapter 4410, it is possible to ensure a rational and sequential consideration of environmental alternatives. To accomplish this objective, the Sierra Club suggests the following amendment to the proposed to Rule 4400.1700, subpart 5; Rule 4400.1700, subpart 12; Rule 4400.3250:

Rule 4400.1700, Subp. 5. **Matters Excluded** . When the Minnesota Public Utilities Commission has determined questions of need, including size, type and timing, questions of system configuration, and questions of voltage in issuing ~~issued~~ a Certificate of Need for a LEPGP or a HVTL or placing ~~placed~~ a high voltage transmission line on the Certified HVTL List maintained by the Commission, the EIS shall not address these issues. ~~questions of need, including size, type, and timing, questions of alternative system configurations, or questions of voltage.~~

Rule 4400.1700, Subp.12. **Environmental review requirements.** The requirements of chapter 4410 do not apply to the preparation or consideration of an environmental impact statement for a large electric generating power plant or high voltage transmission line except as provided in this chapter. Environmental reports and assessment at the certificate of need stage shall be performed in accordance with the requirements of Minnesota Rules, 4410.7000 to 4410.7700.

Rule 2750 Subp. 7. **Matters excluded.** When the Public Utilities Commission has determined questions of need, including size, type and timing, questions of system configuration, and questions of voltage in issuing ~~issued~~ a Certificate of Need for a large electric power generating plant or high voltage transmission line or placing ~~placed~~ a high voltage transmission line on the certified HVTL list maintained by the commission, the environmental assessment shall not address

~~these issues. questions of need, including size, type, and timing, questions of alternative system configurations, or questions of voltage.~~

#### **4400.3250 FACTORS EXCLUDED.**

When the Public Utilities Commission has determined questions of need, including size, type and timing, questions of system configuration, and questions of voltage in issuing ~~issued~~ a Certificate of Need for a large electric power generating plant or a high voltage transmission line or placing ~~placed~~ a high voltage transmission line on the certified HVTL list maintained by the commission, ~~questions of need, including size, type, and timing, questions of alternative system configurations, and questions of voltage~~ these issues shall not be factors considered by the board in deciding whether to issue a permit for a proposed facility.

In hearings on this matter, the question was raised whether this clarification of Rules would require the Environmental Quality Board to second-guess the Public Utilities Commission. The Sierra Club believes that this provision, in fact, will increase the likelihood of interagency cooperation. New Chapter 4410 Rules under consideration for environmental review in the Certificate of Need process could ensure that issues of size, type, timing and alternatives would be considered early in the process, avoiding any potential conflict. In the unlikely case where issues were not addressed in the prior agency process, the Sierra Club believes that it would be more efficient and more consistent with applicable law for the EQB to analyze environmental issues, rather than leaving these issues for litigation and judicial resolution.

#### **Preclude Inappropriate Exemptions from Permitting Requirements. [ Proposed Rule 4400.0650]**

There is nothing in the Energy Security and Reliability Act of 2001 that authorizes the Environmental Quality Board to exempt facilities from environmental review as provided in the Proposed Rules. Although the Statement of Need and Reasonableness (SONAR, p. 21) suggests that the exemption for efficiency increases is based on the Act, the Legislature did not remove this class of facilities from EQB review when it exempted efficiency increases from the Public Utilities Commission's certificate of need process. (See Energy Security and Reliability Act of 200, Article 7, Section 33, codified at Minn. Stat. §216B.243, subd. 8.)

Certificate of need review is distinct from review by the EQB of the local environmental impacts of a proposed project and ways in which those effects can be mitigated. If the Legislature had intended to exempt various projects, including expansions of large energy facilities, from Environmental Quality Board permits, the Legislature could have done so. If anything, when the certificate of need process is not triggered, EQB review becomes more necessary to maintain the balance between energy production and environmental goals.

The distinction between the standards applicable for a certificate of need and those for a siting or routing permit is evident in the text of the Energy and Security Reliability Act. For example, in the case of high voltage transmission lines, the Legislature expanded the scope of EQB review and preserved a distinction between facilities covered by the certificate of need and those requiring EQB permits. (See Article 7, Section 29, codified at Minn. Stat. §216B.2421, subd. 2; Article 7, Section 1, codified at Minn. Stat. §116C.52, subd. 4.)

It must also be emphasized that the permitting process at the Minnesota Pollution Control Agency is no substitute for the analysis of environmental impacts and the potential for mitigation performed by the Environmental Quality Board in the siting and routing process. The MPCA is constrained by current interpretations of permit issuance which restrict the inquiry to whether conditions of operation would violate applicable emissions standards. (See e.g. In the Matter of Permit No. 2211-91-OT-1, 489 N.W. 2d 811 (Minn. App. 1992).

The permit issuance process does not currently include an inquiry as to whether an alternative location or alternative size or configuration of a project could mitigate overall environmental impacts. In the case of power plants, this limitation on the permitting process is particularly troubling. It is recognized that mercury emissions from power plants are converted to methyl mercury a brain toxin that bioaccumulates to reach high concentrations in fish and cause brain damage when eaten by children or pregnant women. (See Minnesota Department of Commerce, Minnesota Energy Planning Report 2001, p. 100 ). Yet, there are no State or federal statutes or rules setting permit limits for the emission of mercury.

To maintain the balance between efficiency and environmental protection affirmed by the Minnesota Supreme Court and to permit alternatives and mitigation to be considered, the proposed Rules should be amended to eliminate inappropriate exemptions:

- a) *There should be no exemption from EQB environmental review for modification of a large electric power generating plant up to 10 percent or 100 megawatts. [Proposed Rule 4400.0650, subpart 1]*

The SONAR acknowledges that this "efficiency" exemption could permit the construction of 100 new megawatts of coal combustion at each of the three facilities at the Sherco site (p. 21) without any evaluation of the local environmental impacts of nitrogen oxides, sulfur dioxide, particulate matter, mercury, lead or other toxic chemicals on the local communities affected by this site. The Minnesota Center for Environmental Advocacy has provided specific documentation of facility expansions potentially falling within this exemption.

This result makes a mockery of site review and is not supported by authorizing legislation. The Sierra Club proposes the following amendment to the proposed Rule 4400.0650, subpart 1:

Subp.1. **No permit required.** The following projects are not considered construction of a large electric power generating plant or high voltage transmission line and may be constructed without a permit from the board:

C. large electric power generating plants. . .

~~(2) modification of a large electric power generating plant to increase efficiency as long as the capacity of the plant is not increased more than ten percent or more than 100 megawatts, whichever is greater, and the modification does not require expansion of the plant beyond the developed portion of the site. If a subsequent modification results in a total of more than 100 megawatts of additional capacity, this provision does not apply; or~~

***b) There should be no exemption from EOB environmental review for start-up of an old combustion plant that may have been closed for many years. [Proposed Rule 4400.0650, subpart 1]***

As with the previous exemption, there is no statutory authority to exclude from review an old energy combustion facility that is restarted after years of closure. The Sierra Club would suggest that this exemption be deleted in its entirety from the proposed Rule 4400.0650, subpart 1:

Subp.1. **No permit required.** The following projects are not considered construction of a large electric power generating plant or high voltage transmission line and may be constructed without a permit from the board:

C. large electric power generating plants . . .

~~(5) start up of an existing large electric power generating plant that has been closed for any period of time at no more than its previous capacity rating and in a manner that does not involve a change in the fuel or an expansion of the developed portion of the site.~~

There is a clear policy reason for requiring siting review of an old facility that has been grandfathered in under applicable laws. Even if the facility did not cause undue environmental effects under land use patterns some forty years ago (as in the Taconite Harbor plant referenced in the SONAR, p. 24), a coal-burning or nuclear facility may no longer be located in an appropriate site, given changes in law, scientific knowledge and in residential and natural resource patterns over the years.

Analogous provisions in municipal law require that land use and permitting decisions be reviewed for nonconforming use if a facility has been closed for more than one year. This regulatory scheme permits facilities to continue in operation, but allows law, science and policy to be applied in a modern, timely way if a facility has shut down for a year or more. To reflect this compromise policy, the Sierra Club proposes the following amendment to proposed Rule 4400.0650, subpart 1:

Subp. 1. **No permit required.** The following projects are not considered construction of a large electric power generating plant or high voltage transmission line and may be constructed without a permit from the board:

C. large electric power generating plants . .

(5) start-up of an existing large electric power generating plant that has been closed for ~~any period of time~~ 365 days or less at no more than its previous capacity rating and in a manner that does not involve a change in the fuel or an expansion of the developed portion of the site.

c) *"Refurbishment" of a large electric power generation plant, which may include extension of the useful life of the plant, should require an EQB siting review.*

**[Proposed Rule 4400.0650, subpart 1]**

The Statement of Need and Reasonableness acknowledges that "refurbishment" is designed to capture "that point in the replacement of equipment at an existing plant where the work has gone so far beyond regular maintenance and repair that the plant is essentially being reconstructed." (SONAR, p. 22) The SONAR then suggests that law pertaining to certificate of need would provide appropriate review of refurbished facilities, since a utility may need to demonstrate that equivalent power cannot be provided by renewable energy.

The Sierra Club believes that EQB siting review is required independent of whether a plant can be replaced with renewable energy, which is the issue under consideration in the certificate of need review. EQB siting review uniquely evaluates local environmental impact, the appropriateness of the site chosen for electric power facilities and the availability of mitigation measures.

If a utility proposes to spend hundreds of millions of dollars to rebuild key components of a coal plant or nuclear power plant to extend the useful life of the plant for decades or to rebuild a facility that has been destroyed by fire or other damage, siting review may determine that a more prudent alternative would be to build capacity at a different site or in a different manner to reduce environmental harms. EQB review would uniquely evaluate whether the current site remains the best location for the coal plant, given changes in land use and scientific knowledge since the plant was originally built and to determine how mitigation could best limit environmental harms if the plant should, in fact, be reconstructed.

The Sierra Club proposes the following amendment to the proposed Rules pertaining to this exemption:

Subp. 1. **No permit required.** The following projects are not considered construction of a large electric power generating plant or high voltage transmission line and may be constructed without a permit from the board:

C. large electric power generating plants . .

3) refurbishment of a large electric power generating plant that does not expand the capacity of the plant, extend the useful life of the plant for more than five



years, or expand the plant beyond the developed portion of the site and the refurbishment does not require a certificate of need from the public utilities commission.

**d) Clarifications pertaining to the "site" and "developed portion" of the site should be provided to avoid proliferation of multiple small power plants and expansion of facilities without environmental review. [[Proposed Rules 4400.0500; 4400.0650, subpart 1]**

The exemption for power plants of less than 50 megawatts exceeds the scope and intent of the Energy Security and Reliability Act of 2001 and would permit significant local environmental impacts without environmental review. The Energy Security and Reliability Act of 2001 did not decrease the scope of review of small power plants; quite the reverse. In Article 7, Section 29 of the Act, codified in Minn. Stat. §216B.2421, Subd. 2 (1), the Legislature tightened up the definition of "large energy facility" so that generation plants from 50 to 80 megawatts would now be subject to regulatory review at the Public Utilities Commission. The Legislature also provided in Article 7, Section 29, that generating facilities would require review if a "combination of plants at a single site" had a combined capacity of 50 megawatts.

The proposed EQB draft contains a potential loophole where a project proposer could develop a string of 50-megawatt plants on adjacent sites or even on the same site without any review of the effects of emissions on local residents or natural resources. Even with a natural gas plant, local environmental impacts may be significant.

If proposed small generators are fueled with diesel petroleum fuel, local emissions may include levels of polycyclic aromatic hydrocarbons and small particles that are carcinogenic. Locations in or near dense residential areas may be dangerously inappropriate for such facilities. As noted in the Minnesota Department of Commerce Minnesota Energy Planning Report 2001, "Diesel generators are one of the most polluting types of generation per kilowatt-hour generated, emitting many air pollutants at high levels." Even with facilities as small as one megawatt, the DOC cautioned, "due to their placement where people work and live, operation of modular diesel generators can significantly degrade local air quality conditions." (Report, p. 50).

The Sierra Club recommends the following amendment to proposed Rule 4400.0500:

Subp. 1. **No EQB permit required.** A permit from the EQB is not required to construct a one power plant of less than 50 megawatts on a single site or a transmission line of less than 100 kilovolts. Proposers of such projects must obtain whatever approvals may be required by local, state, or federal units of government with jurisdiction over the project.

The Sierra Club further suggests that the lack of a definition for the "developed portion of the site," so that a refurbishment under Proposed Rule 4400.5600, subpart 1, C (3) or a conversion under subpart 1,C (4) could not expand to include parts of a site previously

used for coal storage or other related uses. The Sierra Club recommends that the following definition be added to Proposed Rule 4400.0200 as follows:

Subp. . **Developed portion of the site.** "Developed portion of the site" means only the portion of the site upon which the facilities of a LEPGP are located, excluding fuel storage, buffers, set backs and portions of the site developed for uses other than generation of electricity.

- e) ***There should be no provision in these Rules that eliminates local review of projects. [Proposed Rule 4400.0650, Subpart 4]***

The Sierra Club is troubled by the Environmental Quality Board's efforts to exempt power plants and power lines from review and approval by local units of government. The Energy and Security Reliability Act of 2001 granted the EQB no authority to preempt local jurisdictions from exercising their regulatory discretion. The Energy Security and Reliability Act of 2001, Article 7, Section 15, codified in Minn. Stat. § 116C.576, envisions a broad scope of review by local jurisdictions. Local units of government may either request the EQB to assume jurisdiction over a project or maintain jurisdiction and conduct their own review. Minn. Stat. § 116C.576, subd. 1.

The Sierra Club proposes that Proposed Rule 4400.0650, Subpart 4 be modified as follows:

Subp. 4. **Local review.** The board need not assume jurisdiction pursuant to Minnesota Statutes 116C.576 of Any project that does not require a permit from the EQB under this part. ~~is also exempt from any requirement to obtain site or route approval from local units of government with jurisdiction over the project pursuant to Minnesota Statutes section 116C.576.~~

**Provide sufficient notice and time for public participation and place the burden on the applicant to justify departures from customary procedure. [Proposed Rules 4400.1350, subparts 2 -5; 4400.1550, subpart 2; 4400.1250, subpart 2; 4400.4050, subpart 3]**

Despite efforts of the Environmental Quality Board to provide notice and opportunity for hearings in the Proposed Rules, there are two critical problems with the process. First, the notice provisions in the Proposed Rules are insufficient to provide property owners with information about the possible risk to their property interests. Second, the statutory timeline from the date an application is completed to the date of decision-making truncates the right of community members and property owners to participate in decisions that may directly affect their health, safety and property values.

- a) Notice should be provided that permits ordinary citizens to appreciate potential risks to their property interests and informs them how to participate in the siting and routing process.

Throughout this process, the Environmental Quality Board has made important efforts to develop notification lists and contact lists and provide information to people who ask to be on those lists. However, it is at least as important to provide an effective method of notification for persons who are not already familiar with power line and power plant issues whose property interests may be affected by a proposed project.

The Sierra Club's experience participating in Xcel Energy's certificate of need proceeding at the Public Utilities Commission for four high voltage transmission lines has convinced us that it is very important that the nature of public notices be defined in state Rules. In the power line case, Xcel Energy made an unusual effort to communicate with property owners about its plans to construct high voltage transmission lines. But, its notification was a glossy brochure which would have given ordinary citizens no sense that their property interests might be adversely affected by the proposed project.

The Sierra Club proposed at the hearing on the Proposed Rules that the most reasonable way to develop adequate notice is to include specific information requirements in the Rules and to authorize the Environmental Quality Board to develop a model notice form to assist applicants in complying with the Rule. The Sierra Club agrees with John and Laura Reinhardt that notification of property owners should include the following basic information:

The project proposer is seeking to build a facility on or near the owner's property, which may affect the owner's property rights

That the applicant may seek to use eminent domain and the authority therefore;

How to get on the project contact list to obtain more information

How the siting/routing process works and, if applicable, that the proposed project will be subject to certificate of need review

How to get a copy of the project proposer's application

How to contact a public advisor who will assist the citizen in the process

How to intervene if there is a contested case proceeding

That there will be a public hearing on the proposal and, the date of the hearing if that is known

A map of the location of the proposed project sufficient to identify what property might be affected by and adjacent to the proposed project.

The Sierra Club commends the Environmental Quality Board staff for the Suggested Changes to Section 1350 of Minnesota Rule Chapter 4400, dated October 11, 2002.

These changes respond to issues the Reinhardts, Sierra Club and MCEA raised about adequate notice and would greatly increase the realistic opportunity of property owners to participate in the process. The form of the proposed notice would also provide better information to individuals and organizations on project notice lists and to local governmental units.

The Sierra Club would suggest only two minor points of clarification. First, where a power generating facility is being considered, property owners may be on a proposed site as well as adjacent to it. In the recent example of the Rapids Power plant proposed in Grand Rapids, efforts were being made to purchase approximately 40 homes in order to locate the coal-burning facility. The following changes should be made in the text of the proposed Rule and the draft notice to acknowledge this possibility;

Rule 4400.1350, Subpart 2 (C).

Each owner whose property is included within or adjacent to any of the proposed sites for a large electric power generating plant or within any of the proposed routes . . .

Draft Notice, Paragraph 1

**Please take notice.** . . This notice is being provided to persons . . . who own property included within or adjacent to a proposed site [or within any of the proposed routes]

Second, the Sierra Club would suggest that both the Rule and the proposed notice reflect that the public has an opportunity to participate in the certificate of need process as well as the siting and routing process.

Rule 4400, 1350, Subpart 3 (I)\_

A statement indicating whether a certificate of need or other authorization from the Minnesota Public Utilities Commission is required for the project, ~~and~~ the status of the matter if such authorization is required and, if the process is pending, that a person can participate in the certification process.

Draft Notice, Paragraph 10

**Certificate of Need.** A certificate of need from the Minnesota Public Utilities Commission is [or is not] required under state law. A certificate of need for this project was applied for on [date] and issued on [date] or [is pending]. Contact the public advisor regarding opportunities to comment or participate in pending certificate of need proceedings.

- b) Community stakeholders should be informed of proposed projects at the earliest possible time, when a draft application is submitted to the Environmental Quality Board.

The SONAR (p. 36) reflects that, in the past, the EQB staff has requested project proposers to provide a draft application before submitting a final application for acceptance. The continuation of this practice is suggested as a way to ensure that applications are supplemented and a dialogue is begun before the brief 10-day review of applications provided in the Proposed Rules, 4400.1250, subpart 1. The Sierra Club agrees with the EQB that this informal process will allow both the project proposer and

the State agency participants to troubleshoot issues pertaining to the completeness of the application and any environmental concerns the application may pose.

However, community members and property owners are left out of this early consideration. According to the Proposed Rules, they receive no notice until the application is finalized. Then, they have only an abbreviated time to prepare for public meetings, identify issues of concern and comment on the scope of environmental review. See Proposed Rules 4400.1550. The Sierra Club recommends that the pre-application phase of the process be opened up to the community to increase the rationality of the process, put all stakeholders on a level playing field and allow adequate time for the public to obtain information in a manner consistent with statutory deadlines.

During the hearing, the question was raised whether an applicant might submit an application piecemeal, complicating the implementation of notice. The Sierra Club would suggest that upon receiving a draft application which is sufficient to describe the project and begin the process of EQB consideration, the EQB could notify the applicant that its obligation for notice has attached. The EQB would continue to have the discretion not to proceed with any substantive review of an application that is incomplete and fragmentary.

To provide early notice and participation, the Sierra Club recommends the following amendments to Proposed Rule 4400.1350.

#### **4400.1350 NOTICE OF PROJECT.**

Subp. 2. **Notification to persons on general list.** Within 15 days after submission of an application or draft application, the applicant shall send written notice of the submission and a description of the proposed project to those persons whose names are on the general list maintained by the EQB for this purpose. The notice must also advise those persons where a copy of the application or draft application may be reviewed and how a copy may be obtained, and that persons who want to continue to receive future notices regarding the matter must notify the EQB of such intent and request that their names be placed on the project contact list.

Subp. 3. **Publication of notice.** Within 15 days after submission of an application or draft application, the applicant shall publish notice in a legal newspaper of general circulation in each county in which a site, route, or any alternative is proposed to be located that an application or draft application has been submitted and a description of the proposed project. The notice must also state where a copy of the application or draft application may be reviewed.

Subp. 4. **Notification of local officials.** Within 15 days after submission of an application or draft application, the applicant shall send a copy of the application or draft application by certified mail to each regional development commission, county, incorporated municipality, and township in which any part of the site or route or any alternative is proposed to be located.

Subp. 5. **Notification of property owners.** Within 15 days after submission of an application or draft application, the applicant shall send written notice of the submission and a description of the proposed project to each owner whose property is adjacent to any of the proposed sites for a large electric power generating plant or within any of the proposed routes for a high voltage transmission line. . . . The notice must also advise the owners where a copy of the application or draft application may be reviewed, ~~and~~ how a copy may be obtained. . . . For purposes of giving notice under this subpart, owners are those persons shown on the records of the county auditor or, in any county where tax statements are mailed by the county treasurer, on the records of the county treasurer, or any other list of owners approved by the chair.

The scheduling of the critical public meeting on the proposed project also leaves too little time for citizens to become informed of issues or engage in a democratic process within their organizations to evaluate whether they wish to take a position on the project. Ten days is inadequate notice for grassroots participation. The Sierra Club suggests, at a minimum, that this time be doubled in the Proposed Rules 4400.1550, subpart 2.

#### **4400.1550 PUBLIC MEETING.**

Subp. 2. **Notice of public meeting.** The EQB shall give at least ~~ten~~ twenty days' notice of the public meeting by mailing notice to persons whose names are on the project contact list maintained pursuant to part 4400.1350, subpart 1.

- c) Where an applicant requests special procedural consideration under the Rules, the applicant should bear the burden of showing that this dispensation will not be abused.

There are places in the Proposed Rules where the project proposer has an option to deviate from customary procedure. The project proposer may seek approval of an application even where some information is missing. A project proposer may also seek to further reduce regulatory discretion and public participation by claiming that there is an emergency requiring the siting or routing of electric generation or transmission facilities.

The statutory language pertaining to incompleteness of an application states that an application is not incomplete if missing information can be received from the applicant early in the process. It is silent about the burden of proof for this showing. (See Energy Security and Reliability Act of 200, Article 7, Section 7, codified at Minn. Stat. §116C.57, Subd. 2a.) The Energy Security and Reliability Act neither requires or precludes that the applicant bear the burden of proving that it did not cause the "emergency" for which it seeks special dispensation. However, the statute does authorize the EQB's discretion in setting criteria for emergency certification by stating that the board shall adopt rules "specifying the criteria for emergency certification." See Article 7, Section 16, codified at Minn. Stat. §116C.577 (b).

The Sierra Club is not opposed to the concept of regulatory flexibility, but proposes the following amendments to the Proposed Rules 4400.1250, subpart 3 and 4400.4050, subpart 3 to ensure that the project proposer bears the burden of proof when asking for regulatory dispensation.

**4400.1250 REVIEW OF APPLICATION.**

Subp. 3. **Reasons for rejection.** The chair shall not reject an application if the applicant demonstrates that information that is missing will be provided by ~~can be obtained from~~ the applicant within 60 days from the date of the application and the lack of the information will not interfere with the public's ability to review the proposed project.

**4400.4050 EMERGENCY PERMIT.**

Subp. 3. **Final decision.** The board shall make a final decision on an emergency permit within 195 days after the board's acceptance of the application. The board shall grant the emergency permit if it finds the following:

A. a demonstrable emergency exists that the applicant did not cause and to which the applicant did not contribute;

In summary, the Sierra Club requests the Administrative Law Judge to recommend to the Environmental Quality Board that the Board modify the Proposed Rules in keeping with these comments to ensure that the Proposed Rules are reasonable and consistent with applicable statutory and case law. The changes requested by the Sierra Club would

1. Clarify the standard for granting or denying of a siting or routing permit so that it is consistent with Minnesota Environmental Policy Act and Environmental Rights Act statutes.
2. Ensure that environmental review of issues of size, type, timing, configuration, and voltage takes place where the State is considering a power plant or power line.
3. Preclude inappropriate exemptions from permitting requirements, so that power plants and power lines are reviewed for the suitability of their location and opportunities to mitigate environmental harms.
4. Provide adequate notice and sufficient time for public participation and place the burden on the applicant to justify departures from customary procedure so that all stakeholders are treated fairly in the permitting process.

Respectfully submitted,

Paula Goodman Maccabee

Program Coordinator, Sierra Club Minnesota Air Toxics Campaign